NOTES OF CASES.

Libel and Slander—Qualified Privilege.—In Fahey *v.* Shafer (Wash.) 167 Pac. 1118, plaintiffs opened an upstairs clothing store and advertised that they sold $25 clothes for $15 because they had no expensive ground floor rent, nor expensive showcases or windows. Ground floor merchants stated to a newspaper advertising manager that plaintiffs could not do business on that basis, and that they would go broke, and asking them to look into plaintiffs' business. It was held that such statements were qualifiedly privileged and that whether a statement in good faith and without malice is privileged is a question for the court, but if there is any evidence reasonably tending to show malice it is for the jury. The evidence was held insufficient to show malice and the judgment of the trial court granting a nonsuit was affirmed. In the course of the opinion the court said:

"The trial court committed no error in holding that on the established facts the occasion of the communications and the relation of the parties to the subject matter was such as to invoke the rule of qualified privilege.

"The next question is, Was there sufficient evidence of malice to take the case to the jury on the question of excess of privilege? We think not. The occasion and circumstances were such that respondents should plainly state what they honestly believed to be true. When it is remembered that appellants were the aggressors and had charged respondents, not by name, indeed, but by a designation equally certain, with exorbitant charges, questionable business methods and with advertising 'fake' reduction sales, an extreme of temperate statement could hardly be expected. Yet even so, when fairly considered, respondents' statements meant no more than that in their belief appellants could not sell what was known in the trade as $25 suits for $15 and continue long in the business.

" 'This privilege is not defeated by the mere fact that the communication is made in terms that were intemperate or excessive from over-excitement' (Atwill *v.* Mackintosh, 120 Mass. 177, 183). See also Billings *v.* Fairbanks (139 Mass. 66, 29 N. E. 544); Brow *v.* Hathaway (13 Allen, Mass. 239); Fahr *v.* Hayes (50 N. J. Law, 275, 13 Atl. 261).

"Respondents' statements were clearly argumentative rather than direct and unqualified charges of false advertising. Taken as a whole they were capable of no other construction. Their conclusions may have been erroneous, and we shall so assume, though the evidence to that effect was far from conclusive. But the mere fact that the conclusion was false if founded on an honest suspicion will not defeat the privilege. This is true even in cases of unqualified statements (Billings *v.* Fairbanks, supra; Piper *v.* Woolman, 43 Neb.

280, 61 N. W. 588; Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482). While in these cases the question of malice was submitted to the jury, the offending statements were not argumentative or qualified as here, but were positive assertions of fact. Yet in each of these cases the court held that proof of falsity alone was not conclusive of malice. Here the statement was not that appellants' advertisements were false in that they were not actually selling $25 suits for $15, but that they could not do so and continue it for long without a crash—clearly a mere expression of opinion. Authority is not wanting that such conditional imputations are not libelous (Ingalls *v.* Allen, Breese, 1 Ill. 300; Mills *v.* Taylor, 3 Bibb. Ky. 469; Blackwell *v.* Smith, 8 Mo. App. 43). Be that as it may, they were not sufficient to take the case to the jury on the question of malice, through mere proof of the falsity of the conclusion, which is all we have here."

Libel and Slander—Privileged Communication by Military Officer. —In Gray *v.* Mossman, 88 Conn. 247, it was held that "a written expression of opinion by a captain respecting the fitness for promotion of a member of his company, and the probable effect of such promotion upon the company and the military service, made in response to a request from his superior officer, is upon its face a privileged communication, and can become actionable only upon proof that the statements therein contained were not only false and defamatory, but were published with malice, that is, with an unjustifiable motive." The communication complained of was as follows:

"SIXTH CO., C. A. C., C. N. G.
NORWALK, Dec. 22, 1909.

Respectfully forwarded to the Adjutant C. A. C., with the explanation that Sergt. Horace M. Gray is an unusually bright, clever man, but has such an unfortunate personality that if he advanced higher the company would suffer grievously. The commanding officer, C. A. C., knows Sergt. Betts. Sergt. Frank Rooney, an exsergeant of the regular army, has the confidence of his officers and the respect of the men. ALBERT MOSSMAN,
Capt. 6th Co., C. A. C., C. N. G., Commanding."

In the opinion the court said:

"If the jury had properly found these words to have been false, under the charge they must have found that they were published in the exercise of a military privilege. In order to hold the defendant liable for publishing a privileged communication of that character, it was essential for the jury to have found that the defendant was actuated by malice in making the publication. In answer to an interrogatory the jury so found. Malice in this sense means that the defendant was actuated by an unjustifiable motive. We have